2003

State of Utah v. Geoffrey Allan Lindsay : Brief of Appellant

Utah Court of Appeals

Brak Belnap; Washington County Attorney; Counsel for Appellee.
Margaret P. Linsay; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. GEOFFREY ALLAN LINDSAY, Defendant/Appellant.	Case No. 20030964-CA

BRIEF OF APPELLANT

APPEAL FROM THE FIFTH DISTRICT JUDICIAL COURT, WASHINGTON COUNTY, STATE OF UTAH, FROM A CONVICTION OF ILLEGAL POSSESSION/USE OF A CONTROLLED SUBSTANCE AND POSSESSION OF DRUG PARAPHERNALIA, BOTH CLASS A MISDEMEANORS, BEFORE THE HONORABLE JAMES L. SHUMATE.

BRAK BELNAP
Washington County Attorney
178 North 200 East
St. George, Utah 84770

Counsel for Appellee

MARGARET P. LINDSAY (6766)
99 East Center Street
P.O. Box 1895
Orem, Utah 84059-1895
Telephone: (801) 764-5824

Counsel for Appellant

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e) (Supp. 2001).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the evidence was insufficient to establish proof beyond a reasonable doubt that Lindsay committed the crimes charged? "[A] trial court's verdict in a criminal case will be set aside only if that verdict is against the clear weight of the evidence or 'if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.'" *City of Orem v Lee*, 846 P.2d 450, 452 (Utah App. 1993) (citing *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). This issue was not preserved at trial, but is reviewed for plain error.

2. Whether Lindsay's due process rights were violated? Whether a defendant's due process rights have been violated is a question of law reviewed for correctness. *See*

Color Country Management v. Labor Com'n, 2001 UT App 370, ¶ 15, 38 P.3d 969. This issue was not preserved at trial, but is reviewed for plain error.

3. Whether the trial court plainly erred in finding Lindsay guilty? Whether a trial court plainly erred is a question of law reviewed for correctness. *State v. Smit*, 2004 UT App 222, ¶ 7, --- P.3d ---.

CONTROLLING STATUTORY PROVISIONS

All other controlling statutory provisions and rules are set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Geoffrey Allan Lindsay appeals from the judgment, sentence and commitment of the Fifth District Court after being convicted illegal possession/use of a controlled substance, a class A misdemeanor and possession of drug paraphernalia, a class A misdemeanor.

B. Trial Court Proceedings and Disposition

Geoffrey Allan Lindsay was charged by information filed in the Fifth Judicial District Court on or about December 19, 2002, with possession of a controlled substance, a class A misdemeanor, in violation of Utah Code Annotated § 58-37-8(2)(a)(i), and with possession of drug paraphernalia, a class A misdemeanor, in violation of Utah Code Annotated § 58-37a-5(1) (R. 1-2).

The arraignment hearing was held on December 30, 2002, whereupon Lindsay entered a plea of not guilty to both charges (R. 8; 76: 3). Lindsay also stated he would hire a lawyer to represent him (R. 76: 4).

A bench trial was held on March 10, 2003 (R. 12; 77). Lindsay was not present and was convicted on both counts in absentia (R. 12; 77: 3).

A review hearing was held on August 14, 2003, (R. 25).

On September 25, 2003, Lindsay was sentenced to a term of 180 days for the controlled substance conviction and to a term of 180 days for the paraphernalia conviction (R. 34). The total time for both sentences was suspended and Lindsay was placed on probation for 24 months (R. 34-36). The trial judge signed the sentencing minute entry on October 2, 2003 (R. 40-43).

On October 31, 2003, Lindsay filed a Notice of Appeal to the Utah Court of Appeals from the judgment and sentence entered in the above case (R. 38-39).

STATEMENT OF RELEVANT FACTS

Bench Trial

Lindsay was not present at the bench trial and did not have any representation of counsel (R. 77: 3). The trial court observed that notice was sent to Lindsay and then concluded that his absence was voluntary (R. 77: 3). Without presenting any evidence, the prosecutor stated:

> Your Honor, Officer Danny Kroff and also Deputy Crouse had contact on December 19, 2002 at the car wash in Hurrican. He was found at that time in

possession of a baggy of marijuana. The baggy being paraphernalia and, obviously, the marijuana being the controlled substance.

(R. 77: 3). The State presented no witnesses or testimony other than the prosecutor's proffer, nor did they introduce anything into evidence (R. 77: 3). Based solely on the prosecutor's proffer, the trial court found Lindsay guilty of both counts (R. 77: 3).

SUMMARY OF ARGUMENT

The evidence was insufficient to establish beyond a reasonable doubt that Lindsay committed the crimes he was charges with considering the fact that absolutely no evidence was presented at trial to substantiate the charges. Moreover, Lindsay's due process rights were violated because he was convicted without any evidence presented against him. Thus, the trial court plainly erred by finding Lindsay guilty because it was patently obvious that no evidence was presented to the court to substantiate the charges. Therefore, this Court should reverse Lindsay's convictions.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS BECAUSE NO EVIDENCE WAS PRESENTED AT TRIAL. THUS, THE FINDING OF GUILTY DENIED LINDSAY HIS RIGHT TO DUE PROCESS AND THE TRIAL COURT PLAINLY ERRED IN FINDING LINDSAY GUILTY WHEN NO EVIDENCE WAS PRESENTED

Geoffrey Lindsay was convicted of possession/use of a controlled substance and possession of drug paraphernalia at a bench trial (R. 77: 3). However, absolutely no evidence or testimony was presented against Lindsay to substantiate the charges (R. 77:

3). In fact, the State called no witnesses and produced no evidence whatsoever (R. 77: 3). Accordingly, the evidence was insufficient to support the convictions and Lindsay was denied his right to due process by being convicted without any testimony or evidence against him. Moreover, the trial court plainly erred in finding Lindsay guilty when there was no evidence to support the charges.

A. No evidence was presented at trial.

"[A] trial court's verdict in a criminal case will be set aside only if that verdict is against the clear weight of the evidence or 'if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.'" *City of Orem v. Lee*, 846 P.2d 450, 452 (Utah App. 1993) (citing *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)).

"In challenging the sufficiency of the evidence .... [the] [d]efendant 'must marshal all evidence supporting the ... verdict and must then show this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict.'" *State v. Vessey*, 967 P.2d 960, 966 (Utah App. 1998) (quoting *State v. Lemons*, 844 P.2d 378, 381 (Utah App. 1992) *cert. denied* 857 P.2d 948 (Utah 1993)).

In this case, there is no evidence to marshal since the entire bench trial consists of the prosecutor proffering what he believed to be the facts to support charges against Lindsay and the trial judge accepting the proffer and finding Lindsay guilty based on the proffer alone (R. 77: 3). Since no evidence was presented, Lindsay asserts that there was insufficient evidence to support the convictions.

B. The convictions violate due process.

Lindsay also asserts that because the convictions were based on a lack of evidence, or at best on hearsay statements made by the prosecutor which are entirely inadmissible as evidence, his right to due process was violated.

In *Thompson v. City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 629, 4 L.Ed.2d 654 (1960), the United State Supreme Court held that it is a "violation of due process to convict and punish a man without evidence of his guilt." Moreover, the Utah Supreme Court has held that a defendant's due process rights are violated if the State fails to prove the charges beyond a reasonable doubt and the defendant is convicted anyway. *See State v. Leleae*, 1999 UT App 368, ¶ 49, 993 P.2d 232. *See also, In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'")

In this case, the only statements offered against Lindsay were hearsay statements that the prosecutor proffered before the trial court (R. 77: 3). Rule 81(e) of the Utah Rules of Civil Procedure provides that the "rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule...." And Rule 43(a) further provides :

> In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

It is elementary that a "prosecutor is not a witness." *See Donnelly v. DeChristoforo*, 416 U.S. 637, 650, 94 S.Ct. 1868, 1875, 40 L.Ed.2d 431 (1974) (Justice Douglas dissenting). Moreover, "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard." *Brinegar v. United States*, 338 U.S. 160, 174, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949). Thus, the statements made by the prosecutor constitute inadmissible hearsay and should not have been considered by the trial judge. Accordingly, Lindsay's right to due process was violated because the convictions were based entirely upon inadmissible statements and impermissibly shifted the burden of proof to the defense.

C. The trial court plainly erred by finding Lindsay guilty when no evidence was offered or admitted.

Lindsay asserts that the trial court plainly erred by finding Lindsay guilty in absence of any evidence supporting the charges, thus preserving the sufficiency and due process issues for appeal.

"To establish plain error, Defendant must show: '(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant....'" *State v. Dominguez*, 2003 UT App 158, ¶25, 72 P.3d 127 (quoting *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)).

As shown above, no evidence was presented at trial to support Lindsay's convictions. It should have been patently obvious to the trial court that the prosecutor could not proffer evidence to support a conviction without calling at least one witness to testify. Moreover, it should have been patently obvious to the trial court that no evidence was admitted on the record to support the charges. Therefore, it should have been patently obvious to the trial court that Lindsay could not be found guilty of the alleged charges. Accordingly, the trial court should have known that the evidence was insufficient to support the convictions and that Lindsay's right to due process was violated by a finding of guilty without any supporting evidence.

Without this error, Lindsay would not have been convicted. Therefore, this Court should reverse Lindsay's convictions.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Lindsay asks this Court to reverse his convictions for illegal possession/use of a controlled substance, a class A misdemeanor, and possession of drug paraphernalia, a class A misdemeanor.

RESPECTFULLY SUBMITTED this 8th day of September, 2004.

Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to Brak Belnap, Washington County Attorney, 178 North 200 East, St. George, UT 84770, this 8th day of September, 2004.

ADDENDA

the trial court and, absent abuse of such discretion, will not be upset on appeal King v Barron, 770 P2d 975 (Utah 1988)

—Separate issues.

When a court considers it convenient or desirable in the interest of justice, any separate issue may be tried separately Page v Utah Home Fire Ins Co , 15 Utah 2d 257, 391 P2d 290 (1964)

Cited in Lignell v Berg, 593 P2d 800 (Utah 1979), Olympus Hills Shopping Ctr, Ltd v Smith's Food & Drug Ctrs , Inc , 889 P2d 445 (Utah Ct App 1994), Stevensen v Goodson, 924 P2d 339 (Utah 1996)

COLLATERAL REFERENCES

Brigham Young Law Review. — Multiple Jury Formats and Civil Litigation *Arnold v Eastern Airlines,* 1991 B Y U L Rev 1005

Am. Jur. 2d. — 1 Am Jur 2d Actions § 110 et seq , 75 Am Jur 2d Trial § 115 et seq

C.J.S. — 1 C J S Actions §§ 109, 117 to 122, 88 C J S Trial §§ 6 to 10

A.L.R. — Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A L R 3d 456

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving personal injury, death, or property damage, 78 A L R Fed 890

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in civil rights actions, 79 A L R Fed 220

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in actions involving patents and copyrights, 79 A L R Fed 532

Propriety of ordering separate trials as to liability and damages, under Rule 42(b) of Federal Rules of Civil Procedure, in contract actions, 79 A L R Fed 812

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in civil rights actions, 81 A L R Fed 732

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving patents, copyrights, or trademarks, 82 A L R Fed 719

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in actions involving securities, 83 A L R Fed 367

Rule 43. Evidence.

(a) *Form.* In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

(b) *Evidence on motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is similar to Rule 43(a) and (e), F R C P

Cross-References. — Evidence generally, § 78-25-2 et seq

Relevancy and its limits, U R E 401 to 411

Witnesses, U R E 601 to 615

NOTES TO DECISIONS

Form.

—Open court.

——Judge's request for investigation.

Failure of judge in divorce action to notify counsel of his asking juvenile authorities to investigate the homes of both parties and make a report thereon did not violate the requirement of Subdivision (a), that all testimony be in open court, to such a degree as to warrant a retrial Austad v Austad, 2 Utah 2d 49, 269 P2d 284 (1954)

Motions.

—Evidentiary hearing.

Although a court can grant or deny a motion on the sole or combined bases of affidavits, depositions or oral testimony, when no depositions have been taken and disputed material facts are alleged in opposing affidavits, there should be an evidentiary hearing to aid in the resolution of those facts Stan Katz Real Estate, Inc v Chavez, 565 P2d 1142 (Utah 1977)